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No. 05-1378

Supreme Court, U.S.
FILED
JUN 30 2006
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA,
Petitioner,

v.

CASSANDRA COLLINS,
Respondent.

On Petition for Writ of Certiorari
To the Alabama Court of Criminal Appeals

BRIEF FOR RESPONDENT CASSANDRA COLLINS IN OPPOSITION

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June 30, 2006

QUESTION PRESENTED

The lower courts' rulings were based on traditional Zerbst-like voluntariness analysis. Petitioner now presents an entirely separate issue, whether Davis v. United States, 512 U.S. 452 (1994), should be expanded to pre-waiver situations. Petitioner failed to pose this question in any lower proceeding and has failed to comply with Supreme Court Rule 14.1(g)(i).

Therefore, the sole issue properly before the Court is whether a writ of certiorari should be granted under these facts.

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JURISDICTION

In order to establish jurisdiction under §1257(a), Petitioner must show that it presented the particular claim at issue here with "fair precision and in due time." Adams v. Robertson, 520 U.S. 83, 87 (1997), citing New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9 (1980). Further, when the highest state court is silent on a federal question, this Court assumes that the issue was not properly presented, Adams, 520 U.S. at 86-87 (1997), citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987), and Petitioner bears the burden of defeating this assumption by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here," Adams, at 86-87, citing Webb v. Webb, 451 U.S. 493, 501 (1981).

This Court does not have jurisdiction under 28 U.S.C. §1257 because Petitioner's Question Presented was never presented to the Alabama Supreme Court.

STATEMENT OF THE CASE

A. Relevant Facts

The pertinent facts for purposes of these proceedings are as follows: On July 21, 2001, police brought Cassandra Collins ("Collins") in for interrogation. At the time, Collins was barely twenty-one years old, with no prior experience with the criminal justice system. (See Clerk's Record ("CR") at 7; Motion to Suppress Statements ("Mot. Suppress") at ¶9).

Immediately prior to giving her videotaped statement Collins was read her Miranda rights. (See Supplemental Clerk's Record ("Supp. CR") at 12, 14-15). Collins'

videotaped interview reveals that she had no understanding of this right before she signed the boilerplate waiver of rights form.

A videotaped exchange between Collins and police corporal G. H. Humphrey highlights Collins' misunderstanding regarding when she was entitled to see a lawyer. This exchange, which occurred after Collins' rights were read to her, but *before* she signed the waiver of rights form, is set forth below:

> Humphrey: Before asking you any questions, I must explain to you that you can remain silent, that anything you say can be used against you in court, that you can talk to a lawyer first and that you have the right to the advice and presence of a lawyer even though you cannot afford to hire one. If you cannot afford to hire a lawyer and want to have one present during interrogation, the court will appoint one before we question you. If you want to answer questions now you can do so, but you can stop answering at any time. You understand those Rights I just read to you?
>
> Collins: Okay, let me ask you a question, it says that I have, I can have a lawyer, I will have to wait to get one.
>
> Humphrey: And that's correct.
>
> Collins: I will have to wait till [sic] when?
>
> *Silence*
>
> Humphrey: Okay, this is my signature, I want you to read this paragraph right here out loud.
>
> (*As instructed, Collins read the paragraph out loud.*)

(Supp. CR at 14-15).

Although she was asked twice if she understood her rights immediately before signing the waiver of rights form, Collins never indicated that she understood her rights. See id. To the contrary, it is plain from the videotape that Collins incorrectly understood that she would have to wait until after she was questioned to get an attorney. See id.

When Collins sought clarification regarding her Miranda right to counsel, Corporal Humphrey unequivocally told Collins that her understanding that she would "have to wait to get" an attorney was correct. (Supp. CR. at 15). Collins then followed up on Corporal Humphrey's deliberate misstatement and asked how long she would have to wait. Id. Neither of the two officers present in the room ever responded to her question. Id. The officer administering her rights ignored Collins' critical question for approximately ten seconds and avoided her gaze, before placing the waiver form in front of her for her signature. (Petitioner's Appendix ("Pet'r. App.") at 5a, 9a.).

B. Proceedings Below

At every court below, Collins has consistently maintained that her statement should be suppressed because she did not validly waive her rights under the totality of the circumstances. The State unsuccessfully attempted to dodge this bullet by trying to redirect the focus of the trial court and Court of Criminal Appeals from the waiver issue to an issue about invoking the right to counsel addressed in Davis, 512 U.S. 452. Refusing to be manipulated into leap frogging over the waiver issue, the trial court and the Alabama Court of Criminal Appeals ruled that the dispositive issue was whether, under the totality of the circumstances, Cassandra Collins voluntarily, knowingly and intelligently waived her right to counsel under Miranda before giving her statement.[1] Both courts held that from the record they could not find a knowing and voluntary waiver of rights as required by Miranda. (Pet'r. App. at 10a, 13a, 23a.).

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[1] Notwithstanding Petitioner's claims to the contrary, the record reflects that the lower court decisions were *not* based on whether Cassandra Collins invoked her right to counsel under Davis. Davis is simply not applicable to whether, under the totality of the circumstances, Collins knowingly and intelligently waived her right to counsel. Hart v. Attorney General of the State of Florida, 323 F. 3d 884, (11th Cir. 2003).

Not surprisingly, considering the facts and rulings in this case, the State completely dropped the Davis argument in its brief filed in support of its application for rehearing to the Court of Criminal Appeals. In fact, the State never bothered mentioning Davis or Edwards v. Arizona, 451 U.S. 477 (1981), when it petitioned the Alabama Supreme Court for certiorari. Now the State attempts to belatedly breathe new life into an irrelevant and long dead issue based on a question that was never presented to the courts below.

1. Trial Court

On September 2, 2003, Collins filed a motion to suppress, asking the trial judge to suppress her videotaped statement to police, wherein she consistently maintained that she never understood her rights under the circumstances surrounding her waiver. (Pet'r. App. at 2a; CR at 4-8; See Mot. Suppress). Collins argued that: (a) "the totality of the circumstances shows that the videotaped statement was involuntary and taken in violation of state and federal constitutional guarantees" (CR at 7); (b) her misconception regarding her Miranda rights was caused when Corporal Humphrey "misled Ms. Collins to believe that she had to wait to get an attorney until after she was interrogated by him" (CR at 6); and (c) it was while she was "operating under this misconception, deliberately created and fostered by Corporal Humphrey," that she waived her constitutional right to talk with an attorney before giving the videotaped statement (CR at 6).

On December 22, 2003, after reviewing the videotape of Collins' statement, the trial judge conducted a hearing on Collins' motion to suppress. (Pet'r. App. at 18a). The trial judge focused on the totality of the circumstances surrounding the waiver, including

the conduct of the police and their deliberate refusal to answer, much less clarify, Collins' question regarding her Miranda right to counsel.

In reviewing the facts, the trial judge was understandably dismayed[2] about the police officers' refusal to clarify Collins' direct question reflecting her confusion and misunderstanding about her right to an attorney, especially since the officers had deliberately contributed to it.

Defense counsel argued that "the videotape itself, when you read it along with the transcript, clearly shows that [Collins] did not know what her rights were." (Pet'r. App. at 18a). The trial judge agreed,[3] holding that Collins had not knowingly or voluntarily waived her right to an attorney. (Pet'r. App. at 2a).

Although in her motion to suppress Collins made a passing reference that she had invoked her Miranda right to counsel prior to being interrogated (CR at 7; Mot. Suppress at ¶8), the overwhelming thrust of her argument focused around the totality of the circumstances. Nevertheless the State seized on this isolated contention and unsuccessfully and incorrectly relied on Davis as the controlling authority in this case at the suppression hearing. Having ruled against the State on the threshold issue of voluntariness, the trial judge never reached the Davis issue of whether Collins had invoked her right to counsel.

The record is devoid of any basis for Petitioner's claim that the statement was suppressed "*entirely* on the basis that Collins' waiver was *per se* invalid because police

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[2] "THE COURT: But there was absolutely no answer to the question, which I still can't understand why there was no answer to the question. I mean, I think I know why..." (Pet'r. App. at 20a).

[3] In fact, throughout the suppression hearing the trial judge reiterated this position, stating, "... I watched that tape twice, and *I listened to the lady and I observed the lady. I do not think that there is any question that she knowingly and voluntarily waived that.* I just – it is due to be suppressed." (Pet'r. App. at 21a) (emphasis added), and by restating that "*there's no way that this Court in good conscience, watching that*

did not terminate the interview immediately following Collins' ambiguous statement about counsel." (Pet. for Writ at 4) (emphasis added). Also, there is simply no basis for Petitioner's claim that the trial judge, in addition to the Court of Criminal Appeals, employed a *per se* analysis under Edwards v. Arizona, 451 U.S. 477 (1981).[4]

Furthermore, notwithstanding Petitioner's unsubstantiated argument to the contrary, there is nothing in the record to reflect that the trial judge was "bothered" (Pet. for Writ at 4) by the officers' failure to terminate the interview immediately following Collins' question about counsel. The evidence reflects that the trial judge was bothered by the officers' failure to mitigate Collins' confusion regarding her Miranda right to counsel, which they are obligated to do under State v. McDevitt, 484 So. 2d 543 (Ala. Crim. App. 1985). Moreover, despite what Petitioner would have one believe, it is clear from the record that the trial judge never addressed the questions of whether Collins invoked her right to counsel or whether the officers should have terminated the interview following Collins' question about counsel[5] (Pet. for Writ at 6).

It is the trial judge's duty to determine whether a statement is voluntary and, unless it appears so, the statement should be excluded. Farrior v. State, 728 So. 2d 691 (Ala. Crim. App. 1998). Whether a waiver is voluntary, knowing and intelligent depends on the particular facts and underlying circumstances of each case, including the background, experience and conduct of the accused – the totality of the circumstances. Click v. State, 695 So. 2d 209, 218 (Ala. Crim. App. 1996).

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video tape can say that lady knowingly and voluntarily waived her right to an attorney." (Pet'r. App. at 23a) (emphasis added).

[4] The Court of Criminal Appeals opinion never mentions Edwards.

[5] Collins expressed her confusion about her Miranda right to counsel *before* the police interview began and *before* she signed the waiver of rights form. Thus, the issue was never whether the police should have terminated the interview immediately following Collins' statements about counsel, as Petitioner claims

The burden is on the State to show voluntariness and a Miranda predicate before such a statement can be admitted into evidence. Lewis v. State, 535 So. 2d 228 (Ala. Crim. App. 1988). The trial prosecutor never addressed this issue, other than to say Collins' rights were read to her and she signed the form. (Pet'r. App. at 19a).

The State failed to meet its acknowledged (Pet. for Writ. at 27) burden of demonstrating that Collins' waiver was valid. The State did not, as alleged, apply the "standard totality-of-the-circumstances" analysis to this case (Pet. for Writ. at 6) but instead narrowly focused on one point, namely the ritualistic reading and signing of the Miranda rights waiver form.[6]

The applicable precedent is clear that the ritualistic reading and signing of Miranda rights is not enough to establish a knowing and voluntary waiver. The reading of rights in this case was clearly not interactive or meant to be meaningful, as evidenced by the officers' complete disregard of Collins' questions. The question is not one of form but whether the defendant in fact knowingly and voluntarily waived the rights delineated in Miranda. North Carolina v. Butler, 441 U.S. 369, 373 (1979).

Moreover, if the mere ritual were enough, there would be no need to look at the totality of the circumstances surrounding the reading and signing of Miranda rights waivers. The State ignored Collins' background, experience, conduct and statements, including that she gave "no indication verbally, by any head nod, by any body language, that she ever understood those rights." (Pet'r. App. at 19a). The State also ignored the

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(Pet. for Writ at 4). In fact, since there was no interview to terminate, the word "terminate" does not appear in either the Court of Criminal Appeals decision, or the transcript of the suppression hearing in question.

[6] Only once, at the end of its original brief to the Court of Criminal Appeals does the State refer to the "totality of circumstances" standard and then only in a conclusory and unsubstantiated fashion. (Brief of Appellant ("Br. of Appellant") at 24).

conduct of their police. The totality of these facts reflects that Collins did not knowingly, voluntarily or intelligently waive her Miranda rights.

In light of the foregoing, the trial prosecutor sought to divert attention away from the waiver issue by repeatedly asking the trial judge to base its decision regarding the admissibility of Collins' statement on Davis, misguidedly insisting that "the *case law is very clear*[7] where Miranda rights are considered, that the Defendant has to have an affirmative request for an attorney before she can invoke her rights to have an attorney present and it has to be unequivocal and unambiguous as to whether or not she wants an attorney there." (Pet'r. App. at 19a) (emphasis added). Refusing to be diverted to the invocation issue raised by the prosecutor's Davis argument, the trial court instead remained focused on the waiver issue and the circumstances surrounding "the state [Collins] was in on the tape" (Pet'r. App. at 21a) when the officers were going through the motions of administering her Miranda rights to her.

2. Alabama Court of Criminal Appeals

The trial judge decided this case on the waiver issue. Thus, notwithstanding Petitioner's protestations to the contrary, it was the prosecutor that remained "fixat[ed] on the invocation issue" (Pet. for Writ at 5), not the trial judge. Then, in its original brief and reply brief to the Alabama Court of Criminal Appeals, it was the State that zealously echoed the trial prosecutor's mistaken statement of law regarding Davis. (See Brief of Appellant ("Br. Appellant"),[8] filed April 2, 2004; State's Reply Brief, filed May 21,

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[7] Having failed at both the trial court and the Court of Criminal Appeals to prevail under its "the case law is very clear" mantra with regard to Davis, and having abandoned this issue at the Alabama Supreme Court, the State is now proclaiming in its petition that the case law with regard to Davis is so unclear that clarification by this Court is necessary.

[8] For clarification, the Government inadvertently entitled their brief "Brief of Appellee" when, in fact, the Government was the Appellant. Here, Respondent will refer to said brief as "Brief of Appellant" to conform with Petitioner's title for same in its Petition for Writ of Certiorari.

2004). Also, without any basis, the State claimed that the trial court found "that Collins statement was not voluntary because it was given after she invoked her right to counsel."[9] (Pet. for Writ at 6).

The State asked the Court of Criminal Appeals to decide one issue: whether "the trial court erroneously grant[ed] Collins's motion to suppress her statement by applying a subjective standard rather than an objective standard to reach its conclusion that Collins invoked her right to counsel." (Br. Appellant at 6). The State now claims that it noticed three issues (Pet. for Writ at 5-6), but it plainly briefed just the one. The substance of the State's brief addressed this one question, focusing exclusively on invocation rather than the issue of waiver.[10]

Under the facts in this case, the Davis issue is an obvious red herring designed to throw the courts off in their consideration of the real issue in this case – whether Collins understood her Miranda rights in light of the totality of the circumstances. The Court of Criminal Appeals refused to be led down the wrong path by the Government's tack.

In describing the events leading up to Collins' waiver, the Court of Criminal Appeals used the following principles to determine whether Collins voluntarily waived her Miranda rights:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced

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[9] The Court of Criminal Appeals opinion never mentions that Collins "did indeed invoke her Miranda right to Counsel," as the State suggests. (Pet. for Writ at 4).

[10] "She did not unambiguously *invoke* her right to counsel. The trial court's ruling was based on a subjective determination that the officers should have answered Collins's questions." (Br. Appellant at 22).

> choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

(Pet'r. App. at 4a-5a) (internal citations omitted). Using these same principles and looking at the totality of the circumstances surrounding the waiver, the Court of Criminal Appeals concluded that Collins *did not* comprehend the full panoply of rights set out in the Miranda warnings, and therefore *did not* voluntarily waive her right to the presence of counsel, as more fully set out below:

> With these principles in mind, we turn to the evidence presented via the videotaped statement. The videotape indicates that Collins was in an office with two police officers. One officer read the Miranda rights to Collins. The officer stated during the initial portion of the videotape that he had read Collins her rights earlier that day. (Supp. R. at 14). After the officer read those rights to Collins, she said, "Okay, let me ask you a question[. It] says that I have, I can have a lawyer[.] I will have to wait to get one." The officer answered, "And that's correct." Collins asked, "And I will have to wait til when?" The officer did not respond. (Supp. R. 15.) Instead, the officer looked away from Collins and cast his eyes downward, onto the waiver-of-rights form, which he appeared to fill out while Collins waited for an answer to her question. After approximately 10 seconds passed, the officer placed the waiver-of-rights form in front of Collins and asked her to read the paragraph on the form.

(Pet'r. App. at 5a) (internal citations omitted).

Like the trial court, the Court of Criminal Appeals found the circumstances surrounding the administration of Collins' Miranda rights troubling, specifically noting that the officers ignored Collins' question[11] and instead remained silent approximately ten seconds, while avoiding her gaze. (Pet'r. App. at 5a). Then, without comment, the officer placed the waiver form in front of Collins for her signature. Id. at 9a.

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[11] "I will have to wait till [sic] when [to get an attorney]?" (Supp. CR at 15).

The Court of Criminal Appeals also noted that:

> ...[T]he officer chose to answer the first question, informing her that she would have to wait for counsel, a response that might have encouraged Collins to give a statement immediately. He chose not to answer the second question, the response to which, depending on his answer, might have encouraged her to invoke her right to counsel immediately.

(Pet'r. App. at 9a-10a).

Judge Shaw noted in his concurrence, in result only, the following circumstances surrounding Collins' waiver:

> Considering the totality of the circumstances present here, specifically, Collins' demeanor, her attempt to clarify exactly when, should she request one, she would be entitled to speak with an attorney, the interrogating officer's refusal even to acknowledge her when she asked how long she would have to wait to speak with an attorney, and the lack of an oral response indicating that she understood her rights, I am not persuaded that the 'high standards of proof' for a knowing and intelligent waiver were met in this case.

(Pet'r. App. at 14a) (internal citations omitted).

The State's representation to the lower courts that under Davis, a police officer need not ask clarifying questions on these facts, was mistaken and contrary to the clear precedent in Alabama requiring police officers to attempt to clarify a suspect's apparent misunderstanding regarding her Miranda right to counsel. State v. McDevitt, 484 So. 2d 543 (Ala. Crim. App. 1985). The State ignored McDevitt until the Court of Criminal Appeals recognized McDevitt as the controlling authority in this case. (Pet'r. App. at 9a). Furthermore, once the Court of Criminal Appeals recognized McDevitt as the controlling authority in this case, the State abandoned Davis completely.

McDevitt does not address Davis or any issues relating to whether or not a suspect had invoked her right to counsel. Instead, McDevitt establishes as the threshold issue whether, under the totality of the circumstances, a suspect has validly waived her Miranda right to counsel, holding that the interrogating officer has a duty to ensure that the suspect fully and correctly understood her rights when the suspect indicates that she might not have fully understood the Miranda warnings. (Pet'r. App. at 8a-9a). Here, Collins indicated she did not fully understand the Miranda warnings. Instead of ensuring that Collins fully and correctly understood her rights as required under McDevitt, the interrogating officer refused to respond, thereby compounding her confusion.

In comparing the two cases the Court of Criminal Appeals of noted that:

> As in McDevitt, Collins made an ambiguous statement about counsel [[12]] after the Miranda rights were read to her ... As in McDevitt, 'It was the obligation of the interrogator not to ignore or gloss over the possible implications of [Collins'] response.' He should have made an inquiry to clarify the ambiguity...'

(Pet'r. App. at 9a) (internal citations omitted). Instead of challenging McDevitt, the State unsuccessfully attempted to distinguish the facts in McDevitt from Collins' by insisting McDevitt's "post-waiver statements objectively showed that the defendant did not fully understand his right to counsel" (State's Brief in Support of Application for Rehearing ("Br. Sup. Application for Reh'g.") at 1), but that Collins' statement "exhibited her understanding that she had a right to an attorney, the question only addressing how long she would have to wait for an attorney (Id. at 1-2). The State's sole argument to support its application for rehearing was that the Court of Criminal Appeals

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[12] The Petitioner plays fast and loose with the phrase "ambiguous statement about counsel" by manipulating it out of context to support its argument that the trial court erroneously employed an Edwards *per se* analysis in assessing the validity of Collins' waiver. (Pet. for Writ at 11, 14, 24, 25, 29) (footnote

ruling was "legally erroneous because, rather than reviewing all matters with an objective consideration of the totality of the circumstances, the majority applied a narrow subjective view of only one item in reaching its conclusion..." (Id. at 1).

The State completely discarded any arguments relating to the applicability of Davis after the Court of Criminal Appeals affirmed the trial judge's decision to suppress the statement. Davis is neither cited nor alluded to in the State's brief in support of its application for rehearing. Moreover, contrary to the arguments it has asserted in support of its petition for writ of certiorari here,[13] the State acknowledged therein that "The majority agreed with the trial court that Collins had not knowingly or voluntarily [or intelligently] waived her right to an attorney" and further "found that State v. McDevitt, 484 So. 2d 543 (Ala. Crim. App. 1985) was the controlling authority." (Br. Sup. Application for Reh'g. at 4-5).

3. Alabama Supreme Court

The State also completely abandoned the Davis argument at the Alabama Supreme Court. Therefore, the Alabama Supreme Court never had the opportunity to address the Davis question presented herein to this Court. In petitioning the Alabama Supreme Court for review the State omitted any reference to Davis or Edwards. (State's Petition for a Writ of Certorari to the Court of Criminal Appeals of Alabama, filed April 8, 2005).

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added for emphasis).

[13] Flip-flopping from its concessions at the Court of Criminal Appeals, Petitioner now claims that the lower courts never made it to the question of whether Collins' waiver was voluntary, knowing, or intelligent, and that the statement was suppressed "*entirely* on the basis that Collins' waiver was *per se* invalid because police did not terminate the interview immediately following Collins' ambiguous statement about counsel." (Pet. for Writ at 4) (emphasis added).

Instead, the State focused on a totality of the circumstances analysis claiming that the decision of the Court of Criminal Appeals was in conflict with prior decisions of the Alabama Supreme Court which had purportedly applied an "objective" standard in determining whether, under the totality of the circumstances, a defendant knowingly and voluntarily waived her constitutional rights before making a statement. (Pet. for Writ at 3-4). The State also claimed that the decision of the Court of Criminal Appeals was in conflict with a prior decision by the Alabama Court of Criminal Appeals, namely McDevitt (Pet. for Writ at 8). Based solely on these two arguments,[14] neither of which is related to Davis, the Alabama Supreme Court granted the writ, which it subsequently quashed.

REASONS FOR DENYING THE WRIT

A. This Case Is the Wrong Vehicle for Deciding the Question Presented as Framed by the State.

1. The Question Presented as Framed by the State was Not Actually Presented to the State Courts as Required.

The very question presented for this Court's review was never raised in the state courts below. This poses an insurmountable obstacle since this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision this Court has been asked to review. Adams v. Robertson, 520 U.S. 83, 86 (1997), citing Heath v. Alabama, 474 U.S. 82, 87 (1985), Illinois v. Gates, 462 U.S. 213, 217-219 (1983), McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940).

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[14] And even in its request for oral argument to "significantly aid [the Alabama Supreme Court] in its determination of the issues presented," the State never mentioned Davis or Edwards. (See State's Request

Further, under Supreme Court Rule 14.1(g)(*i*) a petitioner seeking review of a state court judgment is required to specify in the petition (1) when the federal claims were raised in the state court system, (2) the method or manner of raising such claims, and (3) the way in which such claims were passed on by the state courts. For reasons set forth herein and above, Petitioner has not met this burden.

Petitioner is asking this Court to determine whether the holding in Davis, which only addresses the post-waiver scenario, should be expanded to apply to pre-waiver scenarios. (Pet. for Writ at i). It is Petitioner's burden to show that the question of whether Davis should apply pre-waiver was properly presented to the lower courts. It is assumed, however, that the issue was not properly presented where, as here, the highest state court is silent on the federal question before this Court. Adams, 520 U.S. at 86-87, citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987). To overcome this assumption, Petitioner must demonstrate that the state courts had "a fair opportunity to address the federal question that is sought to be presented here," Adams, 520 U.S. at 87, citing Webb v. Webb, 451 U.S. 493, 501 (1981). Petitioner simply cannot meet this burden since neither the Alabama Supreme Court nor the Court of Criminal Appeals addressed the question on which Petitioner is seeking certiorari, nor did they ever hear the above referenced new arguments on which this question is based.[15]

As grounds for granting certiorari on the Question Presented, Petitioner creatively fashions completely new arguments regarding the applicability of Davis to this case claiming that there is a "deep and entrenched" disagreement and "clear split" (Pet. for

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for Oral Argument ("State's Req. for Oral Arg.")).

[15] This Court has explained that it would be unseemly in our dual system of government "to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." Adams, 520 U.S. at 87, citing Webb, 451 U.S. at 500.

Writ at 12) among the lower courts about whether Davis' clear invocation rule should be extended to apply to pre-waiver as well as post-waiver scenarios. (Pet. for Writ at 12, 13). Petitioner further argues that Davis should apply pre-waiver because to do otherwise is to be "unfaithful to the sensible policy that animates this Court's Davis decision." (Pet. for Writ at 12). Again, none of these arguments were made to any of the lower courts in this case.

In fact, until this petition the Government had never admitted, as it does here, that the holding in Davis only addresses the post-waiver scenario nor had the Government ever before discussed the alleged "deep and entrenched split in authority" (Pet. for Writ at i) regarding the applicability of Davis to pre-waiver situations, which Petitioner now urges this Court to address.

2. This Case was Not Decided on Davis.

This case is about the standard for waiving the right to counsel, not the standard for invoking it. Thus Davis does not apply. As noted above, the Court of Criminal Appeals' opinion begins with the rule that "[o]nly if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived" (Pet'r. App. at 5a), and unequivocally holds that there was no "proof of a knowing and intelligent waiver" (Id. at 10a). The opinion ends with the court reiterating that "[f]rom the record before us, we cannot find the knowing and voluntary waiver of rights required by Miranda" (Id. at 13a) and the concurring opinion explained that "the totality of the circumstances" preclude finding a "knowing and intelligent waiver" because the State failed to prove that Collins fully understood her right to counsel. (Id. at 14a).

Furthermore, in affirming the trial judge's decision to suppress Collins' statement the Court of Criminal Appeals specifically held that "[o]ur holding in McDevitt controls here." (Pet'r. App. at 9a). McDevitt does not address Davis or any issues relating to whether or not a suspect had invoked his right to counsel. Thus the dispositive issue addressed by the state courts was not Davis but whether under the totality of the circumstances Collins properly waived her Miranda rights. Petitioner acknowledged that this issue provides independent grounds for suppression. (Pet. for Writ at 10).

It was almost as an afterthought and only after it had already concluded that Collins did not knowingly and intelligently waive her rights that, at the State's repeated behest, the Court of Criminal Appeals briefly addressed Davis. In fact before it ever turned its attention to Davis the Court of Criminal Appeals held that "without proof of a knowing and intelligent waiver, the trial court correctly granted Collins' motion to suppress the statement" (Pet. for Writ. at App. 10a). Once the Court of Criminal Appeals found that Collins' waiver was invalid, the Davis issue became moot.[16]

As noted above, even the State concedes that once a court holds that a suspect did not knowingly and intelligently waive her rights, Davis' invocation issues become irrelevant. (Pet'r. App. at 10a). And the State has not asked this Court to review the Alabama Court of Criminal Appeals' holding that Collins did not knowingly and intelligently waive her Miranda rights. Accordingly, regardless of whether this Court reaches the Question Presented, the result in this case would remain the same. Collins'

[16]As the Court of Criminal Appeals correctly noted, Davis only applies when a suspect has validly waived her rights. Such was not the case here.

statement must be suppressed regardless of any ruling on the Question Presented. Consequently, there are no grounds for granting certiorari in this case.[17]

3. The State Abandoned Its Arguments on Davis Below.

On appeal, beginning with its argument in support of its application for rehearing to the Court of Criminal Appeals, the State completely abandoned Davis and instead focused entirely on the totality of circumstances. Nevertheless, after having prematurely abandoned Davis at the lower court, Petitioner now seeks to resurrect Davis to secure this Court's consideration by mischaracterizing the issues addressed by the lower courts in this case. Despite its attempts, however, Petitioner has failed to establish that it presented the particular claim at issue here with "fair precision and in due time." Adams v. Robertson, 520 U.S. 83, 87 (1997), citing New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9 (1980).

The State never addressed the alleged split in authority regarding the applicability of Davis to pre-waiver situations although the Court of Criminal Appeals virtually invited the State to do so when it noted, in what amounted to dicta, that although it had "not specifically considered whether Davis applies to pre-waiver situations...other appellate courts have considered this issue." (Pet. for Writ at 15). In addition, the State never challenged the Court of Criminal Appeals ruling based on its interpretation of Davis. Moreover, the State never challenged McDevitt which it now apparently seeks to overrule or change based on an alleged conflict between circuits.

Furthermore, in petitioning the Alabama Supreme Court for review, the State never mentions Davis or Edwards nor does it present any issues even relating to Davis or

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[17]Certiorari is unlikely when other grounds for affirmance may preclude the Court from reaching the question presented. See Robert L. Stern et al., Supreme Court Practice, at 455 (8th ed. 2002).

Edwards. Instead the State maintains its focus on whether the Court of Criminal Appeals erred by applying an alleged subjective review rather than an objective review of the totality of the circumstances surrounding the waiver of rights.[18] In light of the foregoing, this Court should not reach the question presented and the petition should be denied.

B. The Court of Criminal Appeals Correctly Decided this Case on the Merits.

In conformity with established precedent, the Court of Criminal Appeals affirmed the trial court's decision to suppress Collins' statement by holding that "from the record before us, we cannot find the knowing and voluntary waiver of rights required by Miranda." (Pet'r. App. at 13a). See also McDevitt, 484 So. 2d 543 (Ala. Crim. App. 1985); Hart v. Attorney General of the State of Florida, 323 F. 3d 884 (11th Cir. 2003). Thus, clearly there is no basis for Petitioner's claim that "the lower courts never made it" to the question of whether Collins voluntarily, knowingly and intelligently waived her rights under the totality of the circumstances" (Pet. for Writ at 4), but instead focused entirely on whether Collins had invoked her right to counsel as required under Edwards and Davis.

Furthermore, if the lower courts had, in fact, side-stepped the waiver issue as erroneously claimed by Petitioner, the lower courts would be in violation of established law. See Hart. Like Collins, Hart sought to suppress his statement arguing that his waiver was not voluntary, knowing, and intelligent because he was mislead as to the nature of the rights he was waiving. Yet, in contrast to what happened here, the state courts committed reversal error in Hart by bypassing the waiver issue and focusing solely on Davis in determining the admissibility of Hart's statement, finding that Hart had failed to

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[18] State's Brief in Support of Petition for Writ of Certiorari to the Court of Criminal Appeals at 2.

make a clear request for counsel as required. The Eleventh Circuit reversed[19] the state court's decision, holding that Hart's waiver was not voluntary, knowing and intelligent as required by Miranda, and that the state court's failure to identify and apply the correct legal rule, i.e. the totality of the circumstances, to the waiver issue resulted in a decision that was contrary to clearly established federal law, as determined by the Supreme Court. Hart, 323 F. 3d at 892, 893, 895.

Moreover, Edwards, Davis, and their progeny reveal that the first step in any due process analysis regarding the admissibility of a statement is determining whether a statement was voluntary, knowing, and intelligent under the totality of the circumstances. It is only after the court has made the threshold determination regarding whether a statement is voluntary, knowing and intelligent that the issues in Edwards and Davis arise. Since the trial judge determined that Collins' statement was not voluntary, knowing and intelligent, the issues addressed in Edwards[20] and Davis do not arise.

Significantly, Davis, which provides insight as to how to apply Edwards, reiterated the well-settled law that "[a] suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, *and that the police must explain this right to him before questioning begins.*" Davis,at 457 (emphasis added).

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[19] After signing the waiver form that had been "carefully explained" to him, Hart asked additional questions regarding his rights including the pros and cons of having a lawyer. The court concluded, after looking at the totality of the circumstances surrounding the interrogation, that Hart's waiver "was not made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). Hart at 893.

[20] After he voluntarily, knowingly and intelligently relinquished his right to counsel, Edwards proceeded to give a statement to the police. The suppression issue arose much later after the police reinitiated contact with Edwards following his request for an attorney "before making a deal." Edwards at 478-479.

The police refused to explain this right to Collins. This is especially egregious given Collins expressed misunderstanding about her right to counsel, which police deliberately perpetuated. The Davis court also noted that, "a suspect who knowingly and voluntarily waives his right to counsel, after having that right explained to him, has indicated his willingness to deal with the police unassisted." Davis, at 460-461. Collins never had her rights explained to her correctly. Therefore, the case was properly decided on the threshold issue of voluntariness, precluding the lower courts from ever reaching the Davis/Edwards issue.

Finally, the Court of Criminal Appeals noted that this Court's decision in Davis did not preclude the trial court from granting the relief Collins requested in her motion to suppress. (Pet'r. App. At 12 a). The holding in Davis only addresses the post-waiver scenario: "We therefore hold that, after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." Therefore, the Court of Criminal Appeals did not apply Davis to the facts of this case, and that the statement was due to be suppressed on independent grounds.

C. The Purported Split Among the Courts is Not Real

Notwithstanding the Petitioner's protestations to the contrary, (Pet. for Writ at 8, 11, 29), the Collins' decision was based on a run of the mill application of the traditional Zerbst-like voluntariness analysis. Dissatisfied with the Court of Criminal Appeals fact bound application of that analysis in this case, the Petitioner has not only reinvented the legal issues upon which this case was decided, but now claims that this non-existent decision relates to a purported conflict of law that does not exist.

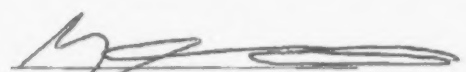
A straightforward reading of the decision below reflects that it turns upon its own facts. Consequently, few others besides the litigants will be affected by it. Furthermore, it cannot be said that another court would reach a different result on the same or very similar set of facts. Under these circumstances, the granting of certiorari would be inappropriate for reconciling the purported split involving a legal issue that was never presented with the clarity needed for effective adjudication.

Certainly none of these allegedly conflicting cases appear to suggest that Davis is relevant where, as here, a waiver is deemed invalid under the totality of the circumstances. They, in fact, appear to agree that these are entirely separate issues. As Petitioner itself concedes, "The fact that the State bears the burden in the normal course of proving a waiver's validity *has nothing at all to do* with whether a suspect should be required to speak clearly in order to obtain the benefit of the heightened, *per se* waiver rule that applies under Edwards." (Pet. for Writ at 28).

CONCLUSION

For the foregoing reasons, Cassandra Collins respectfully requests that this Honorable Court deny the State's Petition for a Writ of Certiorari.

Respectfully submitted,



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June 30, 2006